

NO JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

<p>NACIMIENTO WATER COMPANY, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>INTERNATIONAL FIDELITY INSURANCE CO. A New Jersey Corporation,</p> <p style="text-align: center;">Defendants.</p>	<p>) Case No. CV 13-07959 DDP (MRWx)</p> <p>)</p> <p>)</p> <p>) <b>ORDER GRANTING CROSS-DEFENDANT OAK</b></p> <p>) <b>SHORES SPE, LLC'S MOTION FOR</b></p> <p>) <b>SUMMARY JUDGMENT</b></p> <p>)</p> <p>)</p> <p>) [Dkt. 78]</p> <p>) [TERM:OAK SHORES II SPE,LLC(ROEL)]</p> <p>)</p> <p>)</p> <p>)</p>
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Presently before the court is Cross-Defendant Oak Shores SPE, LLC ("Oak Shores")'s Motion for Summary Judgment. Having considered the submissions of the parties and heard oral argument, the court grants the motion and adopts the following order.

**I. Background**

In 2003, Jonatkim Enterprises, the developer of a residential subdivision in San Luis Obispo County, entered into a contract with Plaintiff Nacimiento Water Company ("the Water Company"). Under the contract (the "Water Contract"), the Water Company agreed to

1 provide water service to the residential lots in exchange for  
2 payment of \$5,000 per lot, to be paid within four years of the  
3 recordation of the subdivision's final tract map. The contract  
4 also required the issuance of a \$500,000 performance bond, which  
5 was issued by Cross-Complainant International Fidelity Insurance  
6 Company ("IFIC") on the developer's behalf.

7 Developer Jonatkim made a partial payment to the Water  
8 Company, but then transferred its interest in the subdivision to  
9 John and Carol King ("the Kings"). The Kings also assumed  
10 Jonatkim's obligations under the Water Contract, and obtained a  
11 surety bond from IFIC similar to that originally issued to  
12 Jonatkim. The Kings also agreed to indemnify IFIC for any losses  
13 connected to the bond and agreed to assign to IFIC, in the event of  
14 a breach, all of their rights under the Water Contract. The Kings  
15 financed their purchase of the subdivision with a loan from Oak  
16 Shores' predecessor in interest. The Deed of Trust securing the  
17 Kings' promissory note was amended several times, with the Kings  
18 ultimately borrowing over \$15 million from Oak Shores' predecessor.

19 Oak Shores' predecessor also entered into a subordination  
20 agreement with the Kings, which stated that the Deed of Trust was  
21 subordinate to "those certain water supply facilities, utilities  
22 and water apparatus, easements and water rights to be conveyed" to  
23 the Water Company under the Water Contract. (Oak Shores' Request  
24 for Judicial Notice, Exhibit M.) The Water Company consented to  
25 the assignment under these terms.<sup>1</sup> (Id.)

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26  
27 <sup>1</sup> The subordination agreement specified that the rights to be  
28 conveyed to the Water Company were set forth in Sections 3.01,  
3.02, 3.03. 4.03, 4.04. 4.05, 4.06, and 4.07 of the Water Contract.  
(continued...)

1 The Kings later defaulted on their loan. The mortgage lender  
2 eventually foreclosed on the subdivision, which Oak Shores then  
3 obtained via a Trustee's Sale.<sup>2</sup>

4 In 2010, the Water Company notified IFIC that Jonatkim and its  
5 successors had defaulted on the Water Contract. The Water Company  
6 therefore demanded \$305,000 pursuant to the IFIC performance bond.  
7 IFIC did not pay the Water Company, which then filed the instant  
8 suit to recover under the bond.<sup>3</sup>

9 IFIC filed a counterclaim and cross claim against the Water  
10 Company, Jonatkim, the Kings, and Oak Shores. IFIC's Second  
11 Amended Counterclaim and Crossclaim alleges a single claim against  
12 Oak Shores for declaratory relief. Essentially, IFIC alleges that  
13 if it makes the bond payment to the Water Company, it shall be  
14 subrogated to the Water Company's rights to require Oak Shores to  
15 pay \$5,000 per subdivision lot, and that that sum should be paid to  
16 IFIC as reimbursement, rather than to the Water Company. (Second  
17 Amended Counterclaim ¶ 54.) Oak Shores now moves for summary  
18 judgment.

## 19 **II. Legal Standard**

20 Summary judgment is appropriate where the pleadings,  
21 depositions, answers to interrogatories, and admissions on file,  
22 together with the affidavits, if any, show "that there is no  
23 genuine dispute as to any material fact and the movant is entitled

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24 <sup>1</sup>(...continued)

26 <sup>2</sup> Oak Shores did not acquire the property until December 2013,  
27 after the filing of the Water Company's Complaint and IFIC's Cross-  
Claim.

28 <sup>3</sup> IFIC alleges that the amount at issue is \$310,000.

1 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party  
2 seeking summary judgment bears the initial burden of informing the  
3 court of the basis for its motion and of identifying those portions  
4 of the pleadings and discovery responses that demonstrate the  
5 absence of a genuine issue of material fact. See Celotex Corp. v.  
6 Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from  
7 the evidence must be drawn in favor of the nonmoving party. See  
8 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986). If the  
9 moving party does not bear the burden of proof at trial, it is  
10 entitled to summary judgment if it can demonstrate that "there is  
11 an absence of evidence to support the nonmoving party's case."  
12 Celotex, 477 U.S. at 323.

13       Once the moving party meets its burden, the burden shifts to  
14 the nonmoving party opposing the motion, who must "set forth  
15 specific facts showing that there is a genuine issue for trial."  
16 Anderson, 477 U.S. at 256. Summary judgment is warranted if a party  
17 "fails to make a showing sufficient to establish the existence of  
18 an element essential to that party's case, and on which that party  
19 will bear the burden of proof at trial." Celotex, 477 U.S. at 322.  
20 A genuine issue exists if "the evidence is such that a reasonable  
21 jury could return a verdict for the nonmoving party," and material  
22 facts are those "that might affect the outcome of the suit under  
23 the governing law." Anderson, 477 U.S. at 248. There is no genuine  
24 issue of fact "[w]here the record taken as a whole could not lead a  
25 rational trier of fact to find for the nonmoving party." Matsushita  
26 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).  
27 It is not the court's task "to scour the record in search of a  
28 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275, 1278

1 (9th Cir.1996). Counsel has an obligation to lay out their support  
2 clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d 1026, 1031  
3 (9th Cir.2001). The court "need not examine the entire file for  
4 evidence establishing a genuine issue of fact, where the evidence  
5 is not set forth in the opposition papers with adequate references  
6 so that it could conveniently be found." Id.

### 7 **III. Discussion**

8 IFIC's position regarding its declaratory judgment claim  
9 against Oak Shores is somewhat unclear. IFIC does not dispute that  
10 Oak Shores is not a party to the Water Contract. (Opposition at  
11 2:4-5.) Nevertheless, IFIC asserts that the Water Contract binds  
12 all subdivision owners, presumably including Oak Shores. (Opp. at  
13 3:1.) That assertion notwithstanding, IFIC is not seeking to  
14 enforce the Water Contract against Oak Shores, but rather "is  
15 seeking a declaration that when Oak Shores and/or any other  
16 property owners apply for and obtain water from [the Water Company]  
17 under the Water [] Contract, and IFIC has paid [the Water Company]  
18 the per-lot fee associated with same, Oak Shores and the other  
19 property owners must pay IFIC as the rightful and equitable  
20 subrogee of [the Water Company]." (Id. at 3:16-19.) IFIC's claim  
21 is predicated on the assumption, supported by some evidence, that  
22 Oak Shores will at some point obtain water service from the Water  
23 Company.

24 As an initial matter, though not addressed at length by the  
25 parties' memoranda, this court is not certain that a justiciable  
26 controversy exists between IFIC and Oak Shores. This court may not  
27 issue advisory opinions or entangle itself in abstract  
28 disagreements. See Thomas v. Anchorage Equal Rights Comm'n, 220

1 F.3d 1134, 1138 (9th Cir. 2000). "A claim is not ripe for  
2 adjudication if it rests upon contingent future events that may not  
3 occur as anticipated, or indeed may not occur at all." Fidelity  
4 and Guaranty Insurance Co. v. Centex Homes, No. 14-CV-826-LJO, 2014  
5 WL 5823048 at \*4 (E.D. Cal. Nov. 10, 2014) (quoting Texas v. United  
6 Statesu, 523 U.S. 296, 300 (1998)(internal quotations and citations  
7 omitted)).

8 Here, IFIC's position is that if it pays the Water Company out  
9 of the IFIC performance bond, and if Oak Shores then comes to some  
10 independent agreement with the Water Company and if Oak Shores then  
11 pays the Water Company for water hookups, then IFIC should be  
12 entitled to those payments "in order to avoid an unfair and  
13 inequitable double payment to [the Water Company]." (Opp. at 18:  
14 3-4.) While Oak Shores does not dispute that it is engaged in  
15 negotiations with the Water Company, there is currently no contract  
16 between Oak Shores and the Water Company, and no guarantee that  
17 development of the subdivision will proceed or that Oak Shores will  
18 ever pay the Water Company anything. In the event that an  
19 agreement is eventually reached and infrastructure payments to the  
20 Water Company are contemplated or made, and presuming that IFIC  
21 actually pays the remainder of the bond funds to the Water Company  
22 prior to that point, IFIC may well have an equitable subrogation or  
23 indemnification claim against the Water Company and/or Oak Shores.  
24 See generally Chubb Custom Ins. Co. v. Space Sys./Loral, Inc., 710  
25 F.3d 946, 957 (9th Cir. 2013). Because such a claim would depend  
26 on numerous unrealized contingencies, however, declaratory judgment  
27 would not be appropriate at this stage.

1 Furthermore, even if this dispute were ripe for adjudication,  
2 it is unclear to the court how IFIC could recover against Oak  
3 Shores at present. As discussed above, IFIC does not dispute that  
4 Oak Shores is not a party to the Water Contract. Thus, even if  
5 IFIC is subrogated to the Water Company's rights under the Water  
6 Contract, it cannot (and apparently does not) seek to enforce the  
7 Water Contract against Oak Shores. See Chubb, 710 F.3d at 957 ("An  
8 important limit to the right of subrogation is that it is a purely  
9 derivative right - meaning that the subrogee succeeds to rights no  
10 greater than those of the subrogor."); See also Fireman's Fund Ins.  
11 Co. v. Maryland Casualty Co., 65 Cal.App.4th 1279, 1290-1293  
12 (1998).

13 **IV. Conclusion**

14 For the reasons stated above, Oak Shores' Motion for Summary  
15 Judgment is GRANTED.

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17  
18  
19 IT IS SO ORDERED.

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21 Dated: March 19, 2015



HON. DEAN D. PREGERSON  
United States District Judge